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No. 92-383

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In the Supreme Court of the United States

OCTOBER TERM, 1992

GREGORY R. GORRELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

SEAN CONNELLY
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTIONS PRESENTED

1. Whether the federal mail fraud statute, 18 U.S.C. 1341, applies to a scheme to defraud one's partners of partnership property.

2. Whether the evidence was sufficient to show that petitioner used the mails for purposes of executing a scheme to defraud.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	3
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Carpenter v. *United States*, 484 U.S. 19 (1987)	6
Durland v. *United States*, 161 U.S. 306 (1896)	5
Kann v. *United States*, 323 U.S. 88 (1944)	9
McNally v. *United States*, 483 U.S. 350 (1987)	5, 6
Parr v. *United States*, 363 U.S. 370 (1960)	8, 9
Pereira v. *United States*, 347 U.S. 1 (1954)	3
Schmuck v. *United States*, 489 U.S. 705 (1989)	8, 9
United States v. *Dial*, 757 F.2d 163 (7th Cir.), cert. denied, 474 U.S. 838 (1985)	7
United States v. *Kuna*, 760 F.2d 813 (7th Cir. 1985)	7
United States v. *Maze*, 414 U.S. 395 (1974)	9
United States v. *Pisani*, 590 F. Supp. 1326 (S.D.N.Y. 1984), aff'd in part and rev'd in part, 773 F.2d 397 (2d Cir. 1985)	7

Statutes:

18 U.S.C. 1341	2, 3, 4
18 U.S.C. 1342	2
W. Va. Code § 47-8A-21(1) (1992)	4

Miscellaneous:

14A Michie's Jurisprudence of Virginia and West Virgina, *Partnership* (1989)	4

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is unpublished, but the judgment is noted at 961 F.2d 211 (Table). The opinion of the district court (Pet. App. 11-15) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1992, and a petition for rehearing was denied on June 10, 1992 (Pet. App. 10). The petition for a writ of certiorari was filed on September 1, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of West Virginia, petitioner was convicted on ten counts of mail fraud, 18 U.S.C. 1341, and a related count of using a fictitious name to open a post office box for the purpose of committing mail fraud, 18 U.S.C. 1342. The district court sentenced petitioner to 18 months' imprisonment, to be followed by three years' supervised release. In addition, petitioner was ordered to pay restitution in the amount of $48,381.06. The court of appeals affirmed. Pet. App. 1-9.

1. The evidence at trial showed that petitioner, a partner at the West Virginia law firm of Jackson & Kelly, defrauded the firm of $368,630 in partnership fees. Petitioner created a fictitious consulting firm called HGA Associates. He then altered Jackson & Kelly's internal billing records to obtain reimbursement from the law firm for services the sham consulting firm supposedly provided to the law firm's clients. He concealed the fraud by maintaining two sets of billing records. The Kelly & Jackson invoices mailed to clients reflected the amount of legal fees attributable to work the law firm actually performed. Petitioner altered Jackson & Kelly's internal records, however, to omit a portion of those services and substitute in their place the reimbursements to the phony consulting firm. During 1987 and 1988, petitioner used this fraudulent scheme to obtain from Jackson & Kelly 11 checks totalling $368,630 on behalf of HGA Associates. Pet. App. 2-3.

2. Prior to trial, petitioner moved to dismiss the indictment on the ground that he could not, as a

matter of law, be convicted of mail fraud based on a scheme to defraud involving partnership property. The district court denied that motion. Pet. App. 11-15. Petitioner appealed his conviction, and the court of appeals affirmed in an unpublished opinion. *Id.* at 1-9. The court rejected petitioner's contention that the evidence was insufficient to show that the use of the mails furthered the fraudulent scheme. The court held that a mailing may be totally innocent by itself and that "the pertinent question is whether the invoices were mailed in furtherance of [petitioner's] scheme to defraud Jackson & Kelly." *Id.* at 4-5.

The court explained that petitioner "used the mailed invoices to obtain the payments needed to reimburse the firm for the funds which he fraudulently diverted to his own benefit." Pet. App. 6-7. Accordingly, the court was "persuaded that the mailed invoices played a significant part in [petitioner's] scheme to defraud his partners, and that the facts of this case are sufficient to convict" petitioner of mail fraud. *Id.* at 7 (internal quotation marks omitted). The court of appeals further stated that "[o]ur review of the record and the district court's orders discloses that other arguments raised by [petitioner] on appeal are without merit." *Ibid.*[1]

ARGUMENT

The mail fraud statute requires proof of two elements: (1) the existence of a scheme to defraud; and (2) use of the mails to execute the scheme. 18 U.S.C. 1341; *Pereira* v. *United States*, 347 U.S. 1, 8 (1954).

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[1] Senior District Judge Simons, sitting by designation, dissented. Pet. App. 7-9.

The court of appeals correctly concluded that the evidence was sufficient to establish both of those elements.

1. The plain language of the mail fraud statute reaches "any scheme or artifice to defraud." 18 U.S.C. 1341. In this case, petitioner defrauded his law firm, and ultimately his fellow partners, by executing a scheme that secretly allowed him to take for his own use more than $368,000 in partnership funds. Petitioner does not deny that he knowingly and wrongfully used a deceptive scheme to obtain money that belonged to the partnership.[2] Instead, petitioner argues that the mail fraud statute should not apply here. He reasons that "the phrase, 'scheme or artifice to defraud,' must be interpreted with reference to the common law," Pet. 11, and that under the common law, a partner generally was not criminally liable for embezzling or stealing partnership property, Pet. 11-12.

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[2] Petitioner's scheme violated the partnership agreement, which petitioner signed each year, providing that "[i]n addition to normal Firm income, all fees, commissions, [and] salaries * * * earned by any member * * * shall belong to the Firm." Gov't C.A. Br. 32-33. In addition, petitioner's secret diversion of partnership funds was wrongful under West Virginia statutory law and well-established principles of common law. See, *e.g.*, W. Va. Code § 47-8A-21(1) (1992) ("Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property."); 14A Michie's Jurisprudence of Virginia and West Virginia, *Partnership* §§ 19, 25 (1989) (similar).

This Court rejected a contention virtually identical to petitioner's nearly 100 years ago, in *Durland* v. *United States*, 161 U.S. 306 (1896). The defendant in that case argued that the mail fraud statute "reaches only such cases as, at common law, would come within the definition of 'false pretences' " and under the common law "there must be a misrepresentation as to some existing fact and not a mere promise as to the future." *Id.* at 312. The *Durland* Court nonetheless declined to engraft that common law limitation onto the mail fraud statute, explaining:

> The statute is broader than is claimed. Its letter shows this: "Any scheme or artifice to defraud." Some schemes may be promoted through mere representations and promises as to the future, yet are none the less schemes and artifices to defraud.

161 U.S. at 313. The Court concluded that the statute "includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. The significant fact is the intent and purpose." *Ibid.*

The fundamental holding of *Durland*—that the reach of the mail fraud statute is not limited to frauds that would be a crime at common law—is not undercut by *McNally* v. *United States*, 483 U.S. 350 (1987). The *McNally* decision cites *Durland* for the proposition that "the meaning of the phrase 'any scheme or artifice to defraud,' * * * is to be interpreted broadly insofar as property rights are concerned." 483 U.S. at 356. *McNally* holds only that the mail fraud statute must be "limited in scope to the protection of property rights" as opposed to the intangible rights of state citizens to good government. *Id.* at 360.

Because the present case clearly involves property rights, *McNally* is inapplicable. Cf. *Carpenter* v. *United States*, 484 U.S. 19, 25-28 (1987) (*McNally* does not preclude mail and wire fraud prosecution of reporter who violated fiduciary duty by defrauding his newspaper of its intangible property right to confidential information).[3]

Petitioner's argument is not only inconsistent with this Court's decisions, but also makes little sense. Petitioner's efforts to prohibit application of the mail fraud statute to frauds among partners would have the perverse effect of exempting misconduct among those who owe fiduciary duties to one another. As Judge Posner has explained, "Fraud in the common law sense of deceit is committed by deliberately misleading another by words, by acts, or, in some instances—notably where there is a fiduciary relationship, which creates a duty to disclose all material facts—by silence." *United States* v. *Dial*,

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[3] Petitioner quotes a footnote from *McNally* that "if state law expressly permitted or did not forbid [such conduct], it would take a much clearer indication than the mail fraud statute evidences to convince us that [such conduct] is forbidden under federal law." Pet. 18 (quoting and paraphrasing 483 U.S. at 361 n.9). That footnote does not avail petitioner, because his conduct *was* forbidden under state law (and under the partnership agreement). See note 2, *supra*. Petitioner disputes whether his wrongful conduct would have been punishable as a state law crime or whether instead his partners would have been limited to some form of civil remedy against him. That issue, however, is irrelevant to the scope of the federal mail fraud statute, since "fraud" within the meaning of the mail fraud statute is not limited to conduct that would constitute a crime under state law.

757 F.2d 163, 168 (7th Cir.) (affirming mail and wire fraud convictions), cert. denied, 474 U.S. 838 (1985). Petitioner undeniably breached a fiduciary duty when he secretly converted over $368,000 of partnership assets to his own use. His actions are no less fraudulent simply because his victims were his partners.

Petitioner identifies no conflict among the lower courts on this issue. Indeed, the court of appeals' decision in this case is consistent with the only lower court case expressly discussing whether a partner may be convicted under the mail and wire fraud statutes for schemes victimizing his fellow partners. See *United States* v. *Pisani*, 590 F. Supp. 1326, 1337 (S.D.N.Y. 1984) (law firm partner), aff'd in part and rev'd in part on other grounds, 773 F.2d 397 (2d Cir. 1985). Other courts have affirmed similar convictions without discussing the issue. See, *e.g.*, *United States* v. *Kuna*, 760 F.2d 813 (7th Cir. 1985) (affirming mail fraud convictions of general partner who misused partnership funds).[4]

2. Petitioner also challenges (Pet. 19-27) the sufficiency of the evidence that the mailings were in furtherance of his fraudulent scheme. The court of appeals properly rejected that claim. Petitioner's argument that "the invoices mailed to the clients

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[4] Petitioner criticizes the court of appeals (Pet. 8, 27-29) for summarily rejecting his attempt to limit the mail fraud statute. The district court, however, had issued a five-page memorandum order detailing the reasons it found petitioner's argument without legal merit. See Pet. App. 11-15. The court of appeals appropriately concluded that petitioner's argument was "without merit" and did not warrant discussion. Pet. App. 7.

were in no way false or fraudulent" (Pet. 19) is beside the point. As this Court has explained, "'innocent' mailings—ones that contain no false information—may supply the mailing element" of a mail fraud prosecution. *Schmuck* v. *United States*, 489 U.S. 705, 715 (1989) (citing *Parr* v. *United States*, 363 U.S. 370, 390 (1960)).

In *Schmuck*, the Court found that the government satisfied the mailing element by showing that a car distributor obtained used cars, rolled back their odometers, and resold the cars to unwitting dealers who consummated retail sales by mailing title application forms to the State on behalf of the buyers. The Court explained that it is sufficient if mailing is "incident to an essential part of the scheme" or a "step in [the] plot." 489 U.S. at 710-711. Schmuck's scheme was an "ongoing fraudulent venture," *id.* at 711, and "[a] rational jury could have concluded that the success of Schmuck's venture depended upon his continued harmonious relations with, and good reputation among, retail dealers." *Id.* at 711-712. It was immaterial that the dealers' use of the mails occurred after they purchased the cars. "Schmuck's scheme would have come to an abrupt halt if the dealers either had lost faith in Schmuck or had not been able to resell the cars obtained from him." *Id.* at 712.

The Court's decision in *Schmuck* is directly on point here. As in that case, petitioner concocted an "ongoing fraudulent venture" rather than "a 'one-shot' operation." 489 U.S. at 711. The ongoing success of that scheme depended on petitioner's replenishing with additional partnership revenues the partnership funds he diverted to HGA Associates.

Those revenues were obtained by mailing invoices to clients, who in the course of paying for legal services provided funds for continuing petitioner's fraud. As in *Schmuck*, the mailings at issue were "incident to an essential part of the scheme," 489 U.S. at 711, and therefore distinguishable from the mailings involved in *United States* v. *Maze*, 414 U.S. 395 (1974); *Parr* v. *United States*, *supra*; and *Kann* v. *United States*, 323 U.S. 88 (1944). See *Schmuck*, 489 U.S. at 712-715. The mailing of the client invoices provided a continuous inflow of revenues and allowed petitioner to maintain his ruse that the law firm clients were receiving services from a non-existent consulting firm.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

SEAN CONNELLY
Attorney

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